UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

HIGH FLYING FOODS

and Case 21–CA–135596

UNITE HERE! LOCAL 30

Lisa E. McNeill, Esq., for the General Counsel.

Karl M. Terrell, Esq. and *Jacqueline A. Godoy, Esq.*
(Stokes Wagner Hunt Maretz & Terrell),
of San Diego, California, for the Respondent.

Beth A. Ross, Esq. and *Xochitl A. Lopez, Esq.*
(*Leonard Carder, LLP)*, of Oakland, California,
for the Charging Party.

DECISION

STATEMENT OF THE CASE

CHARLES J. MUHL, Administrative Law Judge. This case involves alleged unfair labor practices by an employer during bargaining for a first contract, a period of time when unlawful conduct may have a significant impact on employee support for a union and on the union's ability to be an effective negotiator. UNITE HERE! Local 30 (the Union) filed an initial unfair labor practice charge on August 26, 2014, and amended charges on September 11, September 26, and November 7, 2014.[1] The General Counsel issued a complaint based on those charges on November 26. The complaint alleges that High Flying Foods (the Respondent) committed numerous violations of Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act), the most significant of which are the discharges of employees Francisco Hernandez and Mirna Soto due to their union and protected concerted activities. The Respondent filed an answer to the complaint on December 9, denying that it engaged in any unlawful conduct.

I conducted a trial on the complaint from January 12 through January 16, 2015, in San Diego, California. Counsel for the parties filed briefs in support of their positions on February 20, 2015, which I have considered. On the entire record, including my observation of the demeanor of witnesses, I make the following findings of fact and conclusions of law.

[1] All dates are in 2014 unless otherwise indicated.

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

The Respondent is engaged in the retail sale of food and beverage products at restaurant outlets located in Oakland, San Diego, and San Francisco, California. In conducting its business operations in the 12-month period ending September 30, 2014, the Respondent derived gross revenues in excess of $500,000 from its San Diego operations. During the same time period, the Respondent also purchased and received, at its San Diego, California restaurant outlets, goods valued in excess of $5000 directly from points located outside the State of California. Thus, I find that, at all material times, the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and is subject to the Board's jurisdiction, as the Respondent admits in its answer. The Respondent also admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Respondent's Recognition of the Union

The Respondent currently operates restaurants at airports in three California cities, including San Diego. Different UNITE HERE! locals represent certain of the Respondent's employees in San Francisco and Oakland. In 2011, the Respondent bid to become a restaurant vendor at the remodeled and expanded San Diego International Airport. On June 24, 2011, the Respondent entered into a neutrality agreement with UNITE HERE! Local 30, in exchange for the Union's political support of the Respondent's bid, which subsequently was approved. The Respondent now operates seven restaurants in terminals 1 and 2 of the San Diego airport.

The Respondent hired Mirna Soto as a server at the Stone Brewing Company restaurant in terminal 2 in June 2013. Francisco Hernandez began working for the Respondent as a utility worker in July 2013. In that capacity, Hernandez was responsible for receiving and storing food, beverage, and dry products in two storage areas beneath terminal 2. He also was responsible for delivering those products to the Respondent's restaurants at that terminal. The Respondent hired Martin Duarte as a line cook in August 2013 and, at material times, he worked in that capacity at Bankers Hill restaurant in terminal 1.

In December 2013, the Union began an organizing campaign in San Diego pursuant to the neutrality agreement. It formed an organizing committee containing 10 to 12 of the Respondent's employees, including Hernandez and Soto. Thereafter, the two employees regularly spoke to their coworkers about the Union and attended union meetings. Beginning in late January 2014, Hernandez and Soto also solicited authorization card signatures from their coworkers, and each employee obtained in the range of 25–30 signed cards for the Union.

The Respondent recognized the Union as the exclusive collective-bargaining representative of its food and beverage, retail, stocking, and warehouse employees pursuant to a

card check on February 14, 2014. At the time of the hearing, the unit contained about 140 to 150 employees.[2]

At some point in March or April following recognition, Soto and other employees were discussing the potential effect that being represented by a union would have on work schedules. Peter Contreras, Stone Brewing's general manager and Soto's direct supervisor, stated to the employees that schedule changes would occur because, with the Union there, whoever had seniority would be the first person to choose a schedule. Contreras then stated that employees would have to pay union dues of $50 to $60, and they already had good work, pay, and insurance without the Union. Contreras said all the people who wanted the Union were whiners.[3]

B. The Respondent's Implementation of a Revised Employee Handbook

The Respondent maintains a company-wide employee handbook, which it updates every year. After recognizing the Union in San Diego, the Respondent issued a revised handbook to employees at all three airport locations in April 2014. The Respondent concedes it took this action without first notifying the Union and offering it an opportunity to bargain.

The 2013 employee handbook contained a brief section on "Punctuality and Attendance." The policy stated that "excessive" absenteeism and tardiness "will not be tolerated" and defined excessive as "more than 3 instances in a 6-month period." The handbook did not contain any definition of "tardy."

The Respondent added a considerable amount of new language to its attendance policy in the 2014 employee handbook, including the following regarding tardiness:

> A tardy is any time you arrive more than three (3) minutes late at your shift/workstation or are not appropriately groomed, dressed and ready to go to work at the beginning of your scheduled shift. Tardiness also includes returning late from breaks or meal periods.
>
> Excessive tardiness will not be tolerated. High Flying Foods defines excessive tardiness as more than 3 instances of arriving more than 3 minutes late in a rolling 6-month period may (sic) result in disciplinary action up to and including termination.
>
> Any tardiness greater than fifteen (15) minutes may result in a disciplinary action.

Both the 2013 and 2014 handbooks contained the following language in the preamble:

[2] The unit description contained in the parties' neutrality agreement is: All regular full-time and regular part-time food and beverage, retail, stocking and warehouse employees, including lead employees and working supervisors who are not authorized to hire, fire or effectively recommend discipline, and excluding supervisors, managers and guards as defined in the National Labor Relations Act. (GC Exh. 2, p. 6.)

[3] The findings of fact regarding this conversation are based on Soto's uncontroverted testimony. Contreras testified at the hearing, but did not discuss, or deny, the statements attributed to him.

> The restaurant…reserves the right to revise, supplement, or rescind any policies or portion of this handbook from time to time, as it deems appropriate, in its sole and absolute discretion. The only recognized deviations from the stated policies are those approved by CEO (sic) and distributed by the HR Director.

When issuing revised handbooks in both 2013 and 2014, the Respondent required each employee to sign an "Employee Acknowledgement Form" stating:

> I understand that the restaurant has the right to change and/or revise the handbook at any time for any reason.
>
> I understand that my employment with High Flying Foods is on an at-will basis, which means that the employment relationship can be terminated at any time and for any reason by either party (the employee or the employer) with or without cause and with or without notice.
>
> I understand that, except for employment at-will status, High Flying Foods can change any and all policies or practices at any time. I also understand that new policies may be added as High Flying Food grows. The restaurant reserves the right to change my hours, wages, benefits and working conditions at any time. It is expressly understood that my at-will employment with this restaurant cannot be changed and/or modified, except by the CEO of High Flying Foods in writing.
>
> I am signing this of my own free will and with the understanding that my employment is at-will. This supersedes all previous agreements, understandings, and representations concerning my employment with High Flying Foods.

C. The Respondent's Disciplinary Actions Policy

In the 2013 and 2014 employee handbooks, the Respondent maintained the following policy concerning disciplinary actions:

> Disciplinary Actions will be issued as follows:
>
> --verbal warning
> --written warning
> --second written warning
> --final written warning and/or up to a three (3) day suspension
> --termination
>
> However, each case is considered based on its facts. In the case of violation of Company policy, varying levels of disciplinary action,

> suspension and/or immediate termination may be appropriate based on its facts.

D. The Respondent's Policies on Conducting Personal Business and Solicitation

In its 2014 employee handbook, the Respondent maintained a "Conducting Personal Business" policy which states: "Employees are to conduct only restaurant business while at work. Employees may not conduct personal business or business for another employer during their scheduled working hours."

The Respondent also maintains a "Solicitation" policy, which states in relevant part:

> High Flying Foods prohibits the solicitation, distribution and posting of materials on or at company property by any employee or nonemployee, except as may be permitted by this policy.
>
> Employees may not solicit other employees during work times…
>
> Employees may not distribute literature of any kind during work times or in any work area at any time…
>
> The posting of materials or electronic announcements are permitted with approval from Human Resources.

No written policy addresses employee discussions of nonwork subjects while at work.

E. The June 27 Circulation of a Petition By Employees Regarding Contract Negotiations

Following recognition, the Union formed a bargaining committee with six initial employee members, including Hernandez, Soto, and Duarte. On May 15, the parties began negotiations for a first contract. In total, the parties held 5 bargaining sessions from May 15 to August 22. Among the attendees for the Respondent, at different points in time, were its President, Kevin Westlye; its Senior Director of Operations at all three airports, Maritza Haller; its Director of Operations for San Diego, Kimberly Hazard; and Human Resources Assistant Carrie Williams. Duarte, Hernandez, and Soto attended all 5 sessions for the Union.

At a bargaining session on June 20, the Union gave employees on the bargaining committee an opportunity to speak out about their frustrations with the perceived lack of progress in contract negotiations. Soto stated that they could get a contract done if the company was not paying so much money to the attorney handling negotiations. Duarte stated that they would really like to see some progress and get something done. Meyers and Westlye were present at this meeting.

After this session, the Union drafted a petition for its bargaining committee members to circulate amongst and obtain signatures from unit employees. The text of the petition stated the employees' concern over unproductive negotiations and asked the Respondent to move the

bargaining process forward. Duarte, Hernandez, and Soto all received a copy of this petition from the Union and obtained employee signatures on it thereafter.

When Duarte arrived for work in the back-of-the-house kitchen on June 27, he had a copy of the petition in a black leather folder inside his backpack.[4] He hung the backpack on a door in the service elevator area, a place used by employees for both work and nonwork purposes, including taking breaks and storing personal belongings. Later that day, Duarte saw his folder on top of a garbage can in the service elevator area, although he himself did not put it there. Duarte observed 4 to 5 other employees open the folder and sign the petition. Thereafter, Kat Dillenback, the general manager of Bankers Hill restaurant, came out of the service elevator. Duarte observed Dillenback opening his black leather folder; taking the petition out and placing it on top of the folder; then taking her cell phone out and photographing the petition before placing it back inside the folder.[5]

At the end of his shift that day, Duarte was approached by Joe Billones, manager of The Counter restaurant in terminal 1. Duarte was standing in the service elevator area next to a cart which had a soda and his black leather folder on it. Billones asked Duarte what the item on the cart was. Duarte said it was his soda and Billones responded no, not that, what is that? Duarte picked up his black leather folder. Billones stated "you can't be doing that here."[6] (Tr. 305.)

The next day, Duarte was speaking to employee Victor Lopez in the service elevator area about the petition when Billones again approached him. Billones stated "you are doing that again? You can't be doing that here." Duarte asked if he could not be handing his folder out or handing out the petition. Billones repeated "you can't be doing that here." Billones returned about a minute later. He told Duarte he did not have anything against unions and that he was unfamiliar with them because he never worked with one before. He reiterated to Duarte that he could not be handing out the petition there.[7] (Tr. 306-307.)

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[4] The Respondent's restaurants are located inside the secure area of the terminals. Inside those secure areas, the publically-accessible parts of the restaurant are referred to as the "front of the house." The areas where cooks, utility workers, and other employees who do not service customers work are referred to as the "back of the house."

[5] I credit Duarte's specific and detailed account of what occurred on June 27, including his testimony that Dillenback photographed the petition. Dillenback largely corroborated Duarte's testimony. She confirmed that she saw the black leather folder on the garbage can and admitted that she opened the folder, viewed the petition, and saw employee signatures on it. Thereafter, Dillenback did not directly deny photographing the petition and instead provided the following brief, ambiguous testimony: "Q: And do you recall if you had your phone on you at the time? A: I don't recall. Q: Do you recall taking your phone out? A: Never." (Tr. 841.) Her response to the second question also came far too rapidly. Finally, Dillenback claimed that she "checked to see if [the folder] was trash." I do not find that claim logical, given that she admittedly observed the folder was leather, not paper.

[6] I credit Duarte's uncontroverted testimony regarding this conversation with Billones, who did not testify at the hearing.

[7] Both Duarte and Lopez testified at the hearing concerning what Billones said on June 28. Lopez's testimony differed somewhat, in that he stated Billones twice told Duarte he could not be giving out petitions "during work hours." The General Counsel's complaint allegations concerning this conversation allege solely that Billones' statements constituted an unlawful prohibition on the circulation of and solicitation of other employees to sign the petition. (Complaint paragraphs 11(b) and 11(e).) As discussed in more detail below, the legal outcome as to those allegations is the same irrespective of

Hernandez also sought employee signatures on the Union's petition on June 27. Jay Miller, his direct supervisor, observed Hernandez obtaining a signature from employee Diana Diaz, while Diaz was working and not on break. Shortly thereafter, Miller approached Hernandez and told him he was "not supposed to be passing papers during working hours." (Tr. 174.) Miller then drafted a shift note to document what occurred. Shift notes are contained in electronic files that are saved in the Respondent's computer system and can be viewed by all of the Respondent's other supervisors. Yet Miller took the additional step of emailing the shift note to Nicholas Pelaez, his supervisor and the assistant director of operations at terminal 2, as well as Westlye, Haller, Hazard, and Williams. Miller stated that he had observed Hernandez asking employees to sign a piece of paper, so he "very casually" asked Hernandez what was going on. When Hernandez responded he was on his lunch break, Miller asked him what the paper was. Hernandez told Miller it was something he had gotten from the Union, to which Miller replied that Hernandez could not be distracting employees while they were on the clock and not on break. Miller noted at the end of the email that he "was able to make out about 3–6 signatures on [the piece of paper.]"[8] (U. Exh. 11.)

F. The Respondent's July 18 Discipline of Duarte

On July 18, Duarte and fellow employee Javier Hernandez were working in the back-of-the-house at Bankers Hill. Duarte was washing dishes and Javier Hernandez was restocking the refrigerator. Javier Hernandez asked Duarte how scheduling would work once the Respondent and the Union reached a contract. The two then had a 10 to 15 minute discussion about the possible approaches to scheduling and seniority.

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whether Duarte's or Lopez's version is credited. As a result, I find it unnecessary to resolve the conflict. However, if a determination was required, I would credit Duarte's testimony. Given his position in the Union and what had occurred with Billones just the day before, I find it likely that Duarte would be more attuned than Lopez to the exact words that Billones said to him on June 28.

[8] I credit Hernandez's account of what Miller stated to him in response to his circulation of the union petition. I found Miller's testimony during cross examination to be, at times, illogical and inconsistent. (Tr. 1256–1265.) Miller first denied having any "conversation" with Hernandez concerning the circulation of the petition. When confronted with his email report of the conversation, Miller then unconvincingly stated he considered their interaction a "discussion," not a conversation. I also do not credit Miller's claim that he sent the shift note to Westlye and other higher level managers because Hernandez had created a "big enough" distraction. Miller conceded that he did not send all shift notes to higher-level managers. Westlye also testified that he normally would be copied on emails if an employee got multiple disciplines (Tr. 1120), but he was copied on this email even though this was the first instance of Hernandez circulating a petition at work. Haller likewise confirmed that Miller did not talk directly to her about issues all the time. (Tr. 1335.) Furthermore, Miller's contention that Hernandez created a big enough distraction is not supported by his own testimony. Miller personally observed Hernandez obtain only one employee signature and could not have known when or how Hernandez obtained the other signatures on the petition, including whether other employees were working when Hernandez did so. In addition, after looking at the petition and observing the 3 to 6 signatures, Miller then documented in his contemporaneous email that Hernandez "only asked a few members of our staff." That wording is inconsistent with Miller's contention that Hernandez created a big distraction. I conclude that Miller sent this email to higher level managers due to their interest in employees' union activities.

About 2 hours later, Bankers Hill Manager Eddie Almada approached Duarte and stated "you cannot speak about union issues while during work." Duarte responded that he understood they could speak about the union as long as it did not interfere with work, and Almada replied "you cannot speak about unions during work hours." (Tr. 310–311.)

Later that same day, Steve Lyle, the Respondent's assistant director of operations for terminal 1, asked Duarte to accompany him to Williams' office. Williams told Duarte that he was having a conversation with Javier Hernandez about the union and it was interfering with work. Duarte conceded the two were discussing the union, but told Williams they did not stop working during the conversation. Duarte stated that he did not understand the policy regarding speaking about unions, because he did not feel it was any different than talking about sports or movies. Williams agreed. Williams then asked "what's this about a petition that was being handed out about a week or so ago?" (Tr. 315.) Duarte responded yes, he was handing out a petition and was a part of the bargaining committee for the Union.

On July 22, Duarte met with Williams and Lyle again. Lyle told Duarte that the Union was a business and he violated the handbook by speaking about an outside business during work hours. Duarte responded that he did not understand how the Union could be considered a business and his discussion with Javier Hernandez never interfered with their work. Lyle stated that the Union was a business and they could not speak about union activities during work hours. Williams and Lyle gave Duarte a written warning documenting a verbal discipline and citing an infraction of the "Conducting Personal Business" policy. The warning also stated that Duarte must "[d]iscontinue conducting personal business for another employer during working hours."[9]

The Respondent did not discipline Javier Hernandez for the same incident.

One to 2 weeks after receiving the write up, Duarte was cleaning an oil filter machine in the service elevator area. Damian Rossworn, a cashier for The Counter restaurant, approached Duarte while Rossworn was on his break. Rossworn, who had just become a member of the bargaining committee, asked Duarte what would become of the committee after the parties reached a contract. Duarte told him that there was other involvement with the Union they could

[9] I credit Duarte's testimony concerning what occurred on July 18 and 22. Almada, Williams, and Javier Hernandez did not testify at the hearing. Thus, Duarte's testimony is uncontroverted as to his discussion with Javier Hernandez and what Almada said to him thereafter on July 18. It also is uncontroverted as to what Williams told him in the July 22 meeting. Although Lyle testified, he could not recall if Williams asked Duarte about union matters. (Tr. 1293-1294.) I also specifically credit Duarte's testimony that, when he was discussing the union matters with Javier Hernandez, the two employees were working. Although Lyle and Dillenback testified concerning Duarte's discipline, neither individual observed the interaction between Duarte and Javier Hernandez and thus had no personal knowledge of whether the two were working. Dillenback also conceded she never spoke to Duarte about whether he was working or not. (Tr. 848.) In addition, I do not credit Lyle's testimony that Duarte said no when Lyle asked him if he was working. (Tr. 1292.) Finally, while the Respondent's counsel appeared to be suggesting during cross examination of Duarte that his discipline was based upon Duarte and Javier Hernandez having a different union discussion while looking at employee schedules and not working, neither Dillenback nor Lyle testified directly to that. In any event, Duarte credibly explained on redirect that he had a separate conversation with Javier Hernandez while looking at the schedules, which lasted only 10 seconds. I find that length insufficient to disrupt the Respondent's business operations.

pursue, including possibly a shop steward position. As they were talking, Almada walked by and observed them.[10]

When the conversation ended and Duarte left the area, Almada approached Rossworn and stated "Hey, what were you guys talking about?" Rossworn said they were discussing the Union. Almada then left to talk to Duarte. Almada told Duarte it was against company policy to "solicit a third party to union activities." (Tr. 322.) Duarte responded that he was not soliciting Rossworn for any union activity and that both he and Rossworn were part of a union without a contract. Almada repeated his statement, to which Duarte responded that he felt Almada was violating his rights to speak about the union and he was protected by labor law that has been around for over 75 years. Almada responded no, you are not.[11]

G. The Respondent's August 2014 Discussion with Jorge Romero

At an unspecified date in August prior to the 25th, Soto and utility worker Jorge Romero spoke for 5 minutes when Romero passed Stone Brewing on a food product delivery to another restaurant. After briefly catching up on their lives, Soto asked Romero if he had gone to any union meetings. When he said no, Soto told him that there was a meeting coming up and asked him to go. She told him that it would be good for him to find out what is going on within the company if he had the time. During this conversation, Contreras observed them and waved his hand at Romero, which Romero took to mean he should keep on going with his delivery.

After Romero arrived at the Artisan Market restaurant and began emptying his cart, Contreras approached him and initially inquired as to how Romero had been. Contreras then asked what Romero and Soto had been talking about. Romero responded "work-related stuff." Contreras then asked what work-related stuff, and Romero told him multiple times "just work-related stuff." Ultimately, Romero told Contreras that they had caught up because they had not seen each other in a long time and Soto had just mentioned the Union to him. Contreras then responded: "I just want to let you know to basically watch what like you're talking about. And I'm just looking out for you, so I just want to give you a heads up, you know, that you can't talk about the Union while you're on the clock." (Tr. 418-419.) After Contreras made that statement, the two of them continued to catch up with one another, including about how Romero was doing at school, until they arrived back at Stone Brewing, where Contreras departed.[12]

[10] Rossworn testified that Duarte had asked him about joining the committee, and he asked Duarte follow-up questions about what he would have to do if he was on the committee. During cross-examination, the Respondent's counsel elicited that Rossworn had stated in his affidavit that he discussed when the next union meeting or picketing would be. Because of Rossworn's varying accounts, I credit Duarte's testimony about the topic of discussion. Nonetheless, under any of these versions, the employees were discussing union matters at the time.

[11] Except as to the topic of discussion as discussed above, I credit the testimony of both Duarte and Rossworn, a neutral witness, concerning what occurred on this date and their discussions with Almada. Their testimony was consistent and uncontroverted, given that Almada did not testify.

[12] I credit Romero's uncontroverted testimony concerning what Contreras said to him, given that Contreras testified and did not deny Romero's account.

H. The Respondent's Suspensions and Discharge of Francisco Hernandez

1. The change in procedure for invoice checking by utility workers

As a utility worker, Hernandez's job duties included receiving product deliveries roughly five to seven times per day. The product vendor provides Hernandez with an invoice listing the items and quantities that had been delivered. Hernandez was responsible for verifying that the products listed on the invoice actually had been received. Prior to July 2014, the Respondent had no formal procedure in place for invoice checking. Hernandez simply would notify a manager if a product listed on an invoice had not been delivered. The Respondent had no issues with Hernandez's work in this regard prior to July 2014.

At some point in late July 2014, Contreras advised Hernandez that he needed to start marking the invoices to verify that the items were delivered. Thereafter, Hernandez either did not mark the invoices at all or placed one big check mark with his initials on them. As a result, Contreras and another manager met with Hernandez on August 1. The managers explained to him that he had to place a checkmark next to each item listed on the invoice to indicate it was received and to initial the invoice.[13]

2. The August 2 counseling of Hernandez for posting a union flyer

In early August, Hernandez posted union flyers in the back-of-the-house areas of several restaurants. Each flyer was about half the size of an 8-½ by 11 inch sheet of paper. At Stone Brewing, Hernandez posted the flyer on a bulletin board with four 8-½ by 11 inch plastic, see-through folders used by management to provide information to employees. Hernandez placed the flyer beneath a management memo about a new beer, in a position where it was not covering any of the information in that memo. Contreras later observed the flyer, removed it, and reposted it in a different area near the employee lockers where other government-required postings were located. Contreras then reported the posting to Pelaez.[14]

[13] The testimony of both Hernandez and Contreras was confusing and divergent as to the dates and substance of this communication, as well as how many conversations the two had prior to August 1. However, the exact events prior to August 1 are not critical, because both individuals agreed Hernandez was advised of the new policy in late July 2014; was instructed on and understood the proper procedure for marking invoices pursuant to the new policy at the August 1 meeting; and that the Respondent is alleged to have issued the first unlawful discipline related to this procedure on August 7. Contreras also testified that any discussions he had with Hernandez on this procedure prior to August 1 constituted "training," and not part of any progressive discipline. (Tr. 757–758.)

[14] With respect to when and where this union flyer was posted, I credit Hernandez's testimony that he posted the flyer in a position where it was not covering any of the text in the Respondent's posted memos. I do not credit Contreras' claim that he observed the flyer covering up his communication. Overall, I found Contreras to be an unbelievable witness. His demeanor changed considerably between direct and cross examination, and his responses during the latter were evasive and confrontational. Specifically as to the posting, Contreras testified inconsistently concerning the size of the flyer and how much of the communication was covered. Moreover, the testimony of Contreras and Supervisor Mike Zavada was inconsistent as to how many times this flyer was posted on the management board. In any event and as discussed in more detail below, the legal outcome of the complaint allegation dealing with this union posting is the same whether the flyer was covering the Respondent's memo or not.

On August 2, Pelaez and another manager met with Hernandez. Pelaez said that he had been informed that Hernandez posted a union flyer in front of the management memo at Stone. Hernandez admitted to posting the flyer, but told Pelaez he posted it at the bottom of the memo so both messages could be seen. Pelaez then said to Hernandez that, if he was posting something like that, he was supposed to notify management about it so they could approve it. He told Hernandez to give the flyer to Pelaez and he would post it. During this same meeting, Pelaez also discussed the new invoice checking procedure with Hernandez.

Pelaez documented what occurred at the August 2 meeting with an email to higher level managers, including Westlye, Haller, Hazard, and Williams. (R. Exh. 24.) As to the Union posting, Pelaez stated "I instructed Francisco to bring union postings to a manager so we can find the best place to post it without disrupting our communication to our employees." Pelaez also described his discussion with Hernandez regarding the invoice checking procedure.

3. The August 9 suspension and August 11 discipline of Hernandez

On August 7, the Respondent received a delivery for Stone Brewing which, according to an invoice, was supposed to include one bag of spring mix salad valued at $60. Hernandez was responsible for completing the invoice checking on this delivery. On August 8, the delivery driver emailed Stone Brewing Kitchen Manager Michael Zavada to advise him that the spring mix salad had not been delivered. On August 9, Zavada confirmed that the spring mix was missing and wrote a shift note concerning what had occurred.

Also on August 9, while he was on his lunch break, Hernandez spoke to fellow employees Jesse Hancher and Michelle Brown in the front of the house at the Phil's BBQ restaurant in terminal 2. When Hernandez approached the two, Brown was on break, while Hancher was standing and cleaning tables. Hancher was asking Brown questions about how the union worked. Hernandez then discussed union dues and benefits with them. Hancher responded that Hernandez was being brainwashed and did not know what he was getting into. Hernandez said that was not right and told Hancher to come to a union meeting and see for himself. Hancher said he was not interested. The conversation lasted 10 to 15 minutes, when no customers were present. Hancher continued to clean tables during the discussion.[15]

At some point thereafter, Hancher reported the conversation to Miller. In turn, Miller immediately sent a text message to Pelaez stating:

> Hey – sorry to bug you before you're here, but potentially just hit that last straw, Francisco was talking to jesse about union while jesse was on the clock, francisco on break. I didn't observe myself but jesse told me.

[15] The findings of fact concerning this discussion are based on the uncontroverted testimony of Hernandez, given that neither Hancher nor Brown testified and no manager was present for the conversation. Although Miller provided hearsay testimony concerning what Hancher told him had occurred, Miller stated therein that Hancher told said he was cleaning the dining room tables when Hernandez was speaking to him. (Tr. 1269.)

Pelaez then forwarded the text to Westlye, Haller, Hazard, and Williams, stating that he wanted to suspend Hernandez but was unsure if he should do so given that no manager heard the discussion. Westlye responded:

> If we set up a quick meeting with Francisco (2 mgrs) so we have a witness) we can simply ask him if he was discussing the union with Jesse. If he says yes he was we can suspend him and talk further.

(U. Exh. 7.)

Later that same day, Pelaez and Miller met with Hernandez. Pelaez told him he was not supposed to talk about the Union during working hours because it was an "outside business." Pelaez gave an example of an outside business being a person who came to work and sold vacuums. He told Hernandez he was suspended for the day because the same issue had been brought up to him before (referring to Hernandez's circulation of the union petition on June 27). At the meeting, Hernandez conceded that he knew Hancher was not on break. However, no discussion occurred concerning whether Hancher was working during the conversation. The Respondent never asked Hancher what he was doing during his conversation with Hernandez. Pelaez confirmed at the hearing that the Respondent suspended Hernandez on August 9, because he admitted in this meeting that Hancher was not on break when Hernandez spoke with him. (Tr. 1011.)

In a follow-up email that day to the same managers, Pelaez documented the discussion which he and Miller had with Hernandez. The email included the following:

> I told Francisco that I had received a report of him talking with another employee about the union on the clock today.
>
> I asked him if he knew how he should have handled it and he said he should have told the other person to chat with him after work or off the clock. I told him that was exactly what I would expect him to do.
>
> Francisco did ask a couple of things: If talking about soccer would it be wrong? I said no, that any non-business conversation is considered OK as long as it does not interfere with work. At no time though is outside business allowed at work while on the clock…[t]alking about outside business, while on the clock at work, is against our rules.

Westlye then responded:

> Let's review Francisco's file to finalize discipline. At the very least he needs to be written up as a final for soliciting at work/creating a hostile work place in conjunction with his suspension.

Miller also coached, but did not discipline, Hancher on that same date regarding the Respondent's personal business policy. Pelaez attributed the different treatment to Hancher not having committed a prior, similar violation.[16]

When he returned to work on August 11, Hazard provided Hernandez with a final written warning. The form listed five instances of Hernandez violating company policies and procedures from July 25 to August 9, including the events on August 9. (GC Exh. 14.)

4. The Respondent's August 16 suspension and August 18 discharge of Hernandez

On August 15, Zavada received another email from the Stone Brewing delivery driver notifying him that sausage and "a few other things" listed on an August 13 invoice had not been delivered. Zavada determined that Hernandez was responsible for receiving this delivery. He also went down to check if the products had been delivered. Zavada testified that the hot vinaigrette, corn tortillas, mustard, and sausage all had not been delivered. Each of these products was listed on the invoice with check marks next to them. (R. Exhs. 2, 25.)

On August 16 when Hernandez arrived at work, Miller told him he was suspended for two days because of missing sausage product, but did not provide any additional details.

On August 18, Hernandez met with Haller, Hazard, and Union Representative Michelle Gutierrez. Hazard told him he was discharged due to missing sausage, but did not present the invoice in question. Hazard told Hernandez he had been trained on how to mark invoices and made a mistake marking something delivered which had not been. She provided and reviewed with Hernandez a written termination form. This document first noted Hernandez checking off on the August 15 invoice that sausage had been delivered when it had not. The form then listed three other previous coachings: checking off an invoice to indicate spring mix had been received when it had not on August 7; the earlier meetings between Hernandez and Contreras, as well as Hernandez and Pelaez, regarding the proper procedure for checking off invoices; and a July 25 discipline for insubordination.[17] The memo then set forth the standards of conduct for insubordination and falsification of company records contained in the Respondent's handbook.

In the termination form, the Respondent did not list the prior disciplines for the posting of the union flyer on August 2 or the union discussion on August 9, which it had included in Hernandez's August 11 final written warning.

[16] At the hearing, the Respondent's witnesses attempted to justify Hernandez's suspension by claiming that he had disrupted Hancher's work. I reject this contention, as the contemporaneous documentation contains no references to work interruption and thus does not corroborate the Respondent's claim. The focus of the supervisory email communication about Hernandez's discussion was that he was talking about the Union while Hancher was "on the clock," without distinguishing whether Hancher was working or not.

[17] The General Counsel's complaint does not allege the Respondent's July 25 discipline of Hernandez for insubordination as unlawful. On July 25, Zavada observed Hernandez not working at Stone Brewing. Hernandez and Zavada offered conflicting testimony concerning whether Hernandez was on break at this time. Either way, they agree that Zavada told Hernandez he needed to get back to work, to which Hernandez retorted "You get back to work." (Tr. 168.)

At the hearing, Westlye testified that Hernandez was discharged solely for his repeated failure to follow the new invoice checking policy.

I. The Respondent's Suspension and Discharge of Mirna Soto

1. The August 20 incident regarding the Respondent's English-only rule

In its employee handbook, the Respondent maintains a rule entitled "Knowledge and Use of the English Language." The rule states in relevant part: "You must speak English when talking to, or when in close proximity to, English-speaking customers or employees."

On August 20, Soto was speaking to fellow server Paola Hernandez in Spanish at the front-of-the-house of Stone Brewing. Bartender Kara Schaal was working behind the bar, where at least one customer was present, and was about 3 to 4 feet from Soto. Pelaez heard Soto speaking, approached her and Paola Hernandez, reminded them of the English-only rule, and asked them to speak English. Soto responded that she was not violating the rule, because nobody was close to them who did not understand Spanish. Pelaez told her that Schaal was nearby and did not speak Spanish, as well as that there were customers in the vicinity. Soto then asked Pelaez why employees in other restaurants were allowed to speak their native languages. Pelaez indicated he was unaware of this happening, but invited Soto to report it to management if it did. Soto then told him she was going to note their conversation.

According to Paola Hernandez, Soto approached her shortly thereafter and said, this is all the "gueras" fault (referring to Schaal) for not being able to understand their language. Soto then said in Spanish that Pelaez just comes to fuck with them and that she wished she could pay someone to beat him up, or something to that effect.[18] (Tr. 611–618, 895.)

According to Schaal, Soto approached her about 5 to 10 minutes after Pelaez spoke to Soto. Soto asked Schaal why she told Pelaez she was offended and had gotten Soto in trouble. Schaal asked her to calm down and said that she must have misunderstood. Soto responded absolutely not. Soto then said to a customer "can you believe that my company doesn't allow me to speak in my native language. This is bullshit." (Tr. 567, 569.)

Schaal then reported the conversation she had with Soto and the comment Soto made to the customer to both Pelaez and Contreras. Schaal asked Contreras if Pelaez told Soto that Schaal was uncomfortable, because "it's creating a very negative work environment and this is getting stressful." (Tr. 571.) Pelaez advised Schaal that he had used Schaal as an example when asking Soto not to speak Spanish, because Schaal was there and did not speak the language. Pelaez also asked Schaal to write a statement concerning what had occurred.

[18] Based upon the record evidence, the exact meanings of the Spanish word and phrase spoken by Soto to Paola Hernandez in this conversation are not clear. As to "gueras," Paola Hernandez testified that she understood the word to mean "blondie" and Contreras testified that it meant "whitey." (Tr. 617, 786.) As to the Spanish phrase, testimony was consistent that the phrase's meaning in English was open to multiple interpretations. The general consensus was that the phrase included both a portion concerning Pelaez causing problems and another involving Soto wanting to pay someone to harm him in some way.

Pelaez reported these events to Westlye, Haller, and Hazard. He testified that he did so because profanity is not allowed in the workplace and he viewed Soto's approach and questioning of Schaal about why she went to management as "retaliation."

A day or two later, Schaal typed out an undated statement in Pelaez's office using a company computer. (GC Exh. 21.) Contreras remained in the room as Schaal typed the statement, doing nothing but looking at her. In the statement, Schaal confirmed the facts described above concerning Soto's interaction with her on August 20. She also stated twice that she felt "uncomfortable" because of the involvement of her customers in the events and because she did not want anyone thinking she was "against any race." Schaal's statement ended with:

> I have also asked several times to not be talked to about the union, and that we are not allowed to be talking about it, but it doesn't stop. She seems to be extremely intense about fighting this company with the union and I do sometimes fear addressing the situation because I want to avoid phone call[s], texts, or random house show ups from her or the union. I feel this situation needs to be addressed at this point so we can all have a more positive, peaceful and enjoyable work experience and not be made to feel so uncomfortable at work.

Schaal testified that her issue with Soto in this regard was not that Soto talked about the Union, it was "how aggressively" she talked about the Union, even after Schaal asked Soto not to talk to her about it. (Tr. 579, 587–588.)

On August 22, Paola Hernandez also typed up a statement following a request from Contreras concerning what happened on August 20. (R. Exh. 17.) She was given a computer to do so, but left by herself to type the statement. Paola Hernandez confirmed the facts as described above concerning her interaction with Soto on August 20. Her statement ended with:

> I feel that Mirna brings a lot of negativity to the restaurant and it has started to affect me by dreading coming in to work when she is scheduled the same shifts that I have because I know that theres (sic) always something that Mirna will complain about.

Paola Hernandez testified that the complaints she heard Soto make included ones concerning schedules, days off, and too many servers working at the same time. Like Schaal, Paola Hernandez testified that she thought Soto should keep these thoughts to herself. [19]

[19] In reaching the findings of fact in this section, I credit the testimony of Schaal and Paola Hernandez. Their testimony was consistent and corroborated by the contemporaneous, but separately provided, statements they submitted to the Respondent, as well as by the Respondent's contemporaneous documentation of what Schaal and Paola Hernandez had reported. Moreover, Paola Hernandez gave compelling and believable testimony when describing how she agonized over a weekend and discussed the events of August 20 with her husband before deciding to report Soto's statement about Pelaez to Contreras. Although both employees did not like Soto's union activities at the workplace, I do not find that their discomfort had any effect on the testimony concerning what happened on August 20. Thus, I do not credit Soto's blanket denial that she had any conversations on August 20 other than the initial one

2. The Respondent's August 25 suspension of Soto

Following the events on August 20, Soto worked on August 21. The Respondent received Schaal's and Paola Hernandez's statements on August 22. Soto was off that day as well as August 23, but worked on August 24 and 25.

On the 25th, Soto brought a flyer with her to work that set forth the Union's position on the employees' right to discuss the union and to speak their own language at work. (GC Exh. 8.) That morning, Soto and bartender Daniel O'Rourke were alone at the bar area of Stone Brewing working, with Soto rolling silverware and O'Rourke cutting fruit for drinks. Customers were present, but were seated on the opposite side of the U-shaped bar. The two spoke about O'Rourke's upcoming vacation to Puerto Rico and his desire to learn some Spanish before the trip. Soto then told him that they had to fight for their rights so that they would all be equal and handed him the flyer. O'Rourke started reading it, while Soto discussed a union demonstration that would be occurring that day. O'Rourke returned the flyer to Soto and stated that Contreras had just seen them reading it. He asked Soto to put the flyer away, because he did not want her to have any problems.

Contreras then approached O'Rourke and asked him what Soto was showing him. O'Rourke responded that he did not know. However, O'Rourke sent Contreras a text message thereafter advising Contreras that Soto had shown him a union flyer, he did not want to get involved, and he did not want to talk about it in front of Soto. (Tr. 680.) Contreras then called Hazard and told her what had occurred. Hazard shared this information with Westlye and Haller. The Respondent then decided to suspend Soto.[20]

Later that same day, Hazard and Contreras met with Soto and advised her she was suspended. When Soto asked why, Hazard stated she could not give her any explanation and the only thing she could say was there were a lot of complaints regarding Soto harassing employees

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with Paola Hernandez, which led to Pelaez reminding her of the English-only rule. By her own account, Soto was upset at Pelaez reminding her of the English-only rule. Her subsequent statements to Schaal and Paola Hernandez are consistent with her admitted distress over what she perceived as the disparate enforcement of that rule.

[20] I credit neutral witness O'Rourke's account of what he told Contreras that day which, by and large, is corroborated by Contreras' contemporaneous shift note about these events. (U. Exh. 4.) However, I also find it worth noting that, despite the existence of this document, Contreras went to great lengths during his testimony on cross-examination to downplay the union component of the employees' conversation and O'Rourke's texts to him about it. (Tr. 774-780.) Only after repeated questioning did Contreras concede that O'Rourke told him Soto was discussing the Union. (Tr. 778-779.) I also do not credit Hazard's testimony that the only thing Contreras told her prior to Soto being suspended was that there was continued tension and O'Rourke was not comfortable speaking to Contreras in Soto's presence. (Tr. 1162–1163.) Rather, I conclude that Contreras told Hazard that the two were discussing the Union and Soto had shown O'Rourke a union flyer. It simply is implausible that Contreras would not share this information, given the Respondent's focus on its employees' union activities prior to then. Moreover, if Contreras had only mentioned continued tension and O'Rourke's discomfort, it is likewise inconceivable that Hazard would not ask Contreras what was making O'Rourke uncomfortable or that the Respondent would suspend Soto without knowing the source of that discomfort.

and creating a hostile work environment. Soto asked her who, when, how, and in which way she was harassing employees. Hazard reiterated she could not tell her anything, because the matter was under investigation.

O'Rourke submitted a statement to the Respondent on August 25, in which he confirmed the facts as described above. At the end of the statement, O'Rourke stated, with respect to Soto's union discussion, "I expressed a lack of disinterest (sic) and avoided any further conversation because I felt uncomfortable and pressured at work." (GC Exh. 22.) At the hearing, O'Rourke testified that he was very uncomfortable when Soto advocated for the Union at the workplace. (Tr. 697.)

3. Soto's August 27 activity at the airport

On August 27, while Soto remained on suspension, Gutierrez and Soto returned to the airport to speak to employees and assist in a union demonstration involving two other restaurant vendors there. Gutierrez had obtained visitor's badges that enabled her and Soto to access the secured area of the airport. At one point, Gutierrez and Soto observed O'Rourke leaving Stone Brewing, approached him and continued walking out of the terminal, and asked if they could speak with him. They told O'Rourke that they wanted to talk to him about the incident with Soto on August 25, thinking it might have had something to do with her suspension. O'Rourke told them he could not speak then, because his ride was waiting for him. Gutierrez asked for O'Rourke's number and he gave it to her. O'Rourke testified that this interaction was "very brief," maybe 1 or 2 minutes. (Tr. 686.)

Shortly thereafter, Gutierrez texted O'Rourke and again asked if they could talk. When O'Rourke asked what the purpose of the conversation was, Gutierrez responded that she wanted to know if the accusations against Soto were accurate and to make sure nothing unfair happened to Soto. O'Rourke provided a lengthy response in which he ultimately declined to communicate further about the situation.

That same day, O'Rourke texted Contreras and advised him that Gutierrez contacted him via text. He then sent Contreras screen shots of the text messages he exchanged with Gutierrez.[21]

4. The Respondent's August 28 discharge of Soto

The very next day, Soto and Gutierrez met with Westlye, Haller, and Pelaez. Westlye stated that there had been several complaints of harassment or hostile work environment from employees and Soto was terminated based upon those complaints. He asked Soto to write a statement. Gutierrez asked what the nature of the complaints was and Westlye responded that he could not disclose that due to confidentiality. Gutierrez questioned how Soto could respond if

[21] At the hearing, the testimony of Gutierrez, Soto, and O'Rourke concerning what occurred on August 27 largely was consistent. However, O'Rourke claimed that Gutierrez and Soto ran after him as he was exiting the airport. Whether the two were walking, briskly or not, or running to get to O'Rourke ultimately is irrelevant. In any event, I credit the account of Gutierrez and Soto, given that O'Rourke corroborated their testimony in all other aspects. I find it unlikely that O'Rourke voluntarily would provide his phone number, then engage in a lengthy text message exchange, if indeed Gutierrez and Soto had run after him and thereby made him feel uncomfortable.

she did not know what the complaints were. Soto ultimately did write a statement in which stated she could not defend herself because the Respondent would not provide any specifics about the complaints against her. (GC Exh. 20.)

During the meeting, Westlye gave Soto a written termination form. (GC Exh. 19.) The form began by stating:

> Employees have filed complaints against you for creating a hostile work environment based upon incidents on two separate days. We have conducted an investigation by interviewing each employee.

The memo then cited three paragraphs of the Respondent's policy on harassment and concluded with a statement that Soto's employment was being terminated. At the hearing, Westlye testified that the "two separate days" referred to in Soto's termination letter were August 20 and August 27. He also testified that the incidents referred to were the ones with Schaal and Paola Hernandez on the first day and the one with O'Rourke on the latter. (Tr. 1121–1122, 1131.) Westlye further stated that he did not discuss the Respondent's bases for the termination in greater detail with Soto on August 28, because Soto had "already displayed a threat (Pelaez) and she had already displayed retaliation against one employee (Schaal) and borderline retaliation against a second employee (O'Rourke)."

Prior to this meeting, the Respondent's investigation into Soto's conduct consisted of obtaining statements from Schaal, Paola Hernandez, and O'Rourke. Pelaez and Contreras also wrote statements detailing their involvement in the events. The Respondent did not interview Soto or solicit information from other employees concerning what had occurred. Rather, Pelaez testified that they were waiting to see if anyone might come forward with information. Westlye also testified that the Respondent did not interview Soto as part of its investigation, because they had a minimum of five people who had witnessed the exchange and provided remarkably similar stories about what occurred. (Tr. 1121–1123, 1127–1128.)

Westlye also testified to additional reasons justifying Soto's discharge, which were not stated in her termination form. These included that she previously had violated the English-only rule; she was "frustrative or argumentative" with Pelaez after being reminded of the rule; and she broke the law by accessing the secured area of the airport with Gutierrez on August 27, despite being suspended. He also stated that the Respondent had a zero tolerance policy about threats or implied threats in the workplace, and Soto violated that in making the comment about Pelaez to Paola Hernandez.[22] (Tr. 1120–1122.)

[22] I find Westlye's testimony regarding the justifications for Soto's discharge, the Respondent's investigation, and the lack of information provided to her in the termination meeting particularly illuminating. Westlye's assertion of these reasons came in narrative form in response to a question during direct exam asking nothing more than what his involvement was in Soto's termination, as opposed to the Respondent's justifications for discharging her. When questioned on cross examination concerning the five people who provided similar stories about what occurred, Westlye could not identify who the individuals were or what the similarities were. Indeed, almost all of the incidents relied upon by the Respondent to discharge Soto involved Soto and one other employee, either Schaal, Paola Hernandez, or O'Rourke. Thus, no corroboration of what occurred could have been provided by anyone but Soto, who admittedly was not interviewed. Westlye also justified the limited explanation he provided Soto in the

J. The Respondent's September 22 Suspension of Martin Duarte

On September 22, Duarte arrived for work 30 minutes after the scheduled start of his shift. About 4 hours later, Dillenback advised him he was suspended for the rest of the day because he was late and on his last write-up.

When he returned to work the next day, Hazard and Lyle met with him and Gutierrez. Hazard told him that, since he was on his final write-up, he could have either been suspended or terminated. She then said they decided to go with the prior day's suspension, since he had shown improvement in his attendance and had not been late since April 2014. Gutierrez asked Hazard if the company had any discretion and Hazard referred her to the employee handbook. The Respondent's written suspension form stated "[a]ny tardiness greater than fifteen (15) minutes *may* result in a disciplinary action." (emphasis added) (R. Exh. 15.)

K. The Respondent's Lack of Bargaining over the Issued Discipline

The Respondent concedes that it did not notify and bargain with the Union concerning the suspensions of Hernandez, Soto, and Duarte, and the discharges of Hernandez and Soto. The parties did not reach any agreements, tentative or otherwise, on discipline or a grievance procedure during their contract negotiations.

ANALYSIS

I. THE RESPONDENT'S IMPLEMENTATION OF A REVISED EMPLOYEE HANDBOOK

The General Counsel's complaint alleges that the Respondent unilaterally changed employees' working conditions by implementing the revised employee handbook in April 2014, and engaged in direct dealing with employees by requiring them to sign a form upon receipt of the handbook which acknowledged the Respondent had the right to unilaterally change working conditions going forward.

It is long settled law that an employer violates Section 8(a)(5) of the Act if it makes material, unilateral changes to employees' terms and conditions of employment during the course of a collective-bargaining relationship. *NLRB v. Katz*, 369 U.S. 736 (1962). Attendance

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termination meeting in part based on alleged concern that the threat Soto made against Pelaez could be credible and that she might further "retaliate" or "confront" other employees. I certainly do not condone the statements Soto made about Schaal and Pelaez on August 20. However, Soto was upset at being counseled on the English-only rule, something Pelaez himself observed, and her statements thereafter were a byproduct of her frustration. Thus, I find Westlye's contention that Soto's comment about Pelaez was a credible threat to be unconvincing. Even Pelaez admitted at the hearing that he did not really take the comment literally. Moreover, the Respondent allowed Soto to work for days after it learned of the comments, which is inconsistent with its claim that the threat was credible. I likewise conclude that Soto's conversations with Schaal and O'Rourke did not rise to the level of retaliation or confrontation as contended. Overall, Westlye's explanation and his attempt to add more justifications for Soto's discharge came across as an exaggeration and this hampered its believability.

and tardiness are mandatory subjects of bargaining which cannot be changed unilaterally. *United Steel Service, Inc.*, 351 NLRB 1361, 1368 (2007). In addition, an employer's reservation of the right to make future changes to employees' terms and conditions of employment constitutes an unlawful unilateral change. *United Cerebral Palsy*, 347 NLRB 603, 608 (2006).

The 2014 employee handbook included new language, and altered a material working condition, as to tardiness. That language indicated employees were tardy if they arrived more than 3 minutes after their scheduled start times, but would be subject to immediate discipline only if they were more than 15 minutes late. While the Respondent contends this change only clarified existing policy, that contention was contradicted by its own witnesses and documents. Westlye testified that the changes were "to the benefit of the employees." (Tr. 1124–1125.) Similarly, Haller stated that the revision "really helps" the employees, because they would not receive automatic discipline for being tardy between 3 and 15 minutes. (Tr. 1339.) If the handbook revisions simply clarified an already-existing policy as to tardiness, the changes could not bestow a benefit upon the employees. The only way the revisions could help the employees was if the policy actually changed. This is borne out in the Respondent's own disciplinary records, which show that certain employees were disciplined for their first instance of being 15 or less minutes late prior to April 2014. (R. Exh. 31, pp. 45, 51; GC 10, pp. 19, 23, 67.) It is irrelevant that the changes were positive, as such unilateral changes still undermine the Union.

In addition, the handbook retained language giving the Respondent the right in its sole discretion to change handbook policies going forward. The language is so broad as to encompass terms and conditions of employment set forth in the handbook, which are mandatory subjects of bargaining. Such reservation of rights clauses disparage the collective-bargaining process, undermine the Union, and are unlawful.

The Respondent also engaged in direct dealing when it required employees to sign an acknowledgement form, which included similar language reserving to the Respondent the right to change employees' terms and conditions of employment at its sole discretion in the future. The Respondent bypassed the Union by taking its handbook changes directly to employees, then requiring them to agree to the changes and to the Respondent being able to make unilateral changes going forward.

The Respondent's remaining defenses to this allegation are without merit. It is irrelevant that the handbook is used company-wide and was in existence in prior years. Once it recognized the Union as its employees' bargaining representative in San Diego, the Respondent could not unilaterally change their terms and conditions of employment through handbook revisions or reserve to itself the right to do so in the future. It is likewise irrelevant that the Union did not object in negotiations to the Respondent's implementation of the revised handbook. The Union did not learn of the revisions until after the Respondent implemented them and thus the changes were a fait accompli. The Respondent also did not change the attendance policy to comply with federal or state law.

Accordingly, I find that the Respondent violated Section 8(a)(5) by making unilateral changes to employees' terms and conditions of employment when it issued the 2014 employee handbook revisions and by engaging in direct dealing when it required employees to sign the form acknowledging the Respondent could unilaterally change their working conditions.

II. THE SECTION 8(A)(1) ALLEGATIONS

A. Respondent's Surveillance of Employees' Protected Activity

The General Counsel alleges that the Respondent engaged in unlawful surveillance of employees' union activities when Dillenback photographed the union petition signed by employees on June 27.

An employer's mere or casual observation of open, public union activity on or near its property does not constitute unlawful surveillance. *F.W. Woolworth Co.*, 310 NLRB 1197 (1993). However, photographing and videotaping such activity constitutes more than mere observation, because such recordkeeping tends to create fear among employees of future reprisals.

Here, Dillenback crossed the line by photographing the petition and keeping a record of the employees who signed it. Duarte, an employee, observed her doing so. The Respondent's only defense to this allegation is that Dillenback did not photograph the petition as Duarte claimed, a contention I reject based upon my credibility determination described above. Accordingly, Dillenback's photographing of the petition violated Section 8(a)(1).

B. The Respondent's Prohibitions on Solicitations and Discussions[23]

The General Counsel's complaint alleges numerous 8(a)(1) violations related to the Respondent's prohibitions on union solicitations and discussions.

As to solicitations, the Board has long recognized the principle that "[w]orking time is for work," and thus has permitted employers to adopt and enforce rules prohibiting solicitation during "working time," absent evidence that the rule was adopted for a discriminatory purpose. *Conagra Foods, Inc.*, 361 NLRB No. 113 (2014). In contrast, rules which prohibit solicitation during "working hours" or while employees are "on the clock" are presumptively invalid. *Burger King*, 331 NLRB 1011, 1012–1013 (2000); *Our Way, Inc.*, 268 NLRB 394 (1983). In addition, solicitations cannot be banned during nonworking times in nonworking areas, nor can bans be extended to working areas during nonworking time. *Food Services of America, Inc*., 360 NLRB No. 123, slip op. at *7 (2014). A limited exception applies to retail establishments, including restaurants. There, solicitation may be banned from the selling floor where customers are normally present, as it would necessarily interfere with the employer's business. *The Times Publishing Co.*, 240 NLRB 1158, 1159 (1979).

Discussions about a union during periods when employees are supposed to be working can be banned, but only if that prohibition extends to other nonwork subjects. *Jensen Enterprises*, 339 NLRB 877, 878 (2003). However, an employer violates the Act when employees are forbidden from discussing the union while working, but are free to discuss other subjects unrelated to work, particularly when the prohibition is announced or enforced only in response to specific union activity.

[23] This section addresses complaint allegations 11, 12(a), 14(b), and 15(a).

In this case, the Respondent's supervisors Billones and Almada communicated unlawfully broad prohibitions on solicitations to employees. This included Billones' statements to Duarte on June 27 that "you can't be doing that here" when Billones observed the union petition in the service elevator area, and when he repeated the phrase twice on June 28 after observing Duarte hand the petition to another employee when both were on break in the same area. It also included when Almada stated twice to Duarte in late July 2014 that it was "against company policy to solicit a third party to union activities," after observing Duarte and Rossworn engaged in a discussion about union matters in the service elevator area. These statements are so broad, with no limitations or specifics on what is and is not allowed, that they encompass times and locations where employees had a protected right to solicit.[24]

The Respondent likewise unlawfully prohibited employees from discussing the union while working on multiple occasions, despite allowing employees to talk about other, nonwork topics. This included Almada's statements to Duarte on July 18 that he could not "speak about union issues while during work" or "speak about unions during work hours." It also included when Pelaez told Hernandez on August 9 that he was not supposed to be talking about the Union during working hours because it was an "outside business." Finally, it included when Contreras told Romero on a date in August 2014 that he could not talk about the Union while he was "on the clock." Witness testimony was uniform that, while prohibiting union discussions, the Respondent permitted employees to talk about numerous other, nonwork topics while they were working. (Tr. 201–202, 319, 391, 421.)

While the Respondent argues it was focused on work disruption, I find this to be a post-hoc rationalization. The contemporaneous statements made by Almada, Billones, Contreras, and Pelaez made no reference to this. In most of these incidents, the statements were made despite the employees either being on break or working while they were talking without any disruption to their duties. The Respondent also presented no evidence that its managers told employees not to discuss other nonwork topics when it was disrupting their work. The issue obviously was the content of these solicitations and discussions.

Accordingly, I find, as alleged in the complaint, that the Respondent violated Section 8(a)(1) by orally promulgating and maintaining rules prohibiting employees from soliciting during work and from circulating and soliciting other employees to sign a petition on behalf of the Union; and prohibiting employees from soliciting other employees on behalf of the Union during work hours.[25] I also conclude the Respondent violated the Act by prohibiting employees

[24] Even if Billones said, as Lopez contended, that Duarte could not circulate a petition and/or solicit employees during "work hours," a prohibition using that term likewise violates the act. *Our Way*, supra, 268 NLRB at 394–395.

[25] The General Counsel alleged two independent 8(a)(1) violations for each of these conversations. Complaint paragraphs 11(a) and (c) are premised on the conversation between Billones and Duarte on June 27; paragraphs 11(b) and 11(e) are based on the conversation between Billones and Duarte on June 28; and paragraphs 11(c) and 11(f) are rooted in the conversation between Almada and Duarte in late July 2014. (GC Brief, p. 40.) The allegations concerning the oral promulgation of rules are sustained based upon *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646–647 (2004), because the statements at issue could reasonably be construed to prohibit union activity and were promulgated in response to union activity.

from discussing the union during working time or working hours, while allowing discussion on other nonwork topics.

C. The Respondent's Questioning of Employees Concerning Union Activities[26]

An unlawful interrogation is one which reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act, under the totality of the circumstances. *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984). The test is an objective one that does not rely on the subjective aspect of whether the employee was, in fact, intimidated. *Multi-Ad Services*, 331 NLRB 1226, 1227–1228 (2000).

The General Counsel alleges that Williams engaged in an unlawful interrogation when, during her investigatory meeting with Duarte on July 18, she asked him "what's this about a petition that was being handed out about a week or so ago?" This meeting occurred shortly after Almada committed an unfair labor practice that day by telling Duarte he could not speak about the union during work hours. Billones previously had made multiple, unlawful statements to Duarte after observing him circulating the petition. The purpose of this meeting was to address Duarte's conversation with Javier Hernandez that day. Williams' question about the petition had nothing to do with that conversation. Given the totality of these circumstances, I find that Williams' question was coercive and violates Section 8(a)(1).

The General Counsel also alleges that Almada unlawfully interrogated Rossworn when, following Rossworn's conversation with Duarte in late July 2014, Almada asked Rossworn "Hey, what were you guys talking about?" Rossworn then admitted the discussion was about the Union. Immediately thereafter, Almada confronted Duarte and stated an unlawfully broad ban on solicitations. During the employees' conversation about the Union, Duarte continued working and Rossworn was on his break. Almada did not ask Rossworn any questions or make any statements concerning disruption of work. Instead, upon learning the discussion concerned the Union, he immediately went to confront Duarte. Therefore, I find Almada's question to be coercive and an unlawful interrogation.

Finally, the General Counsel contends that Contreras unlawfully interrogated Romero in August 2014, when Contreras repeatedly asked him what "work-related stuff" he and Soto had been talking about until Romero finally admitted they discussed the Union. While Contreras did ask repeated questions and followed his questioning with an unlawful statement restricting union discussions, I do not find his initial questioning of Romero to independently violate the Act. Neither Romero nor Soto was performing their job duties when they had this discussion, and the two were not on break. Contreras observed this and waved Romero on so he would complete his delivery. When initially questioned, Romero gave a nonspecific response about the discussion content. Under these circumstances, Contreras' questioning was appropriate, as it went to the question of whether their discussion was interfering with the employees' work.

[26] This section addresses complaint paragraphs 12(b), 13, and 14(a).

III. THE SECTION 8(A)(3) ALLEGATIONS

A. Legal Standard

The complaint alleges that the Respondent took multiple adverse actions in violation of Section 8(a)(3) against Hernandez, Soto, and Duarte due to their union and protected concerted activities. These allegations must be evaluated pursuant to the Board's mixed motive standard as set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), and approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983). Under *Wright Line*, the General Counsel initially must demonstrate by a preponderance of the evidence that the employee's protected conduct was a motivating factor for an employer's adverse action. The General Counsel satisfies that initial burden by showing (1) the employee's protected activity; (2) the employer's knowledge of that activity; and (3) the employer's animus. If the General Counsel meets the initial burden, the burden shifts to the employer to prove, also by a preponderance of the evidence, that it would have taken the adverse action even absent the employee's protected activity. *Mesker Door,* 357 NLRB No. 59, slip op. at 2 (2011). An employer cannot meet its burden by merely showing that it had a legitimate reason for its action. *Alternative Energy Applications Inc.*, 361 NLRB No. 139, slip op. at 3 (2014).

As to the General Counsel's initial *Wright Line* burden in this case, the Respondent concedes that Hernandez, Soto, and Duarte engaged in union activities and it was aware of those activities, but denies union animus. With respect to the third prong, I conclude that the evidence strongly supports an inference that the Respondent was hostile towards its employees' union activities. The catalyst for the Respondent's increased attention to those activities was the June 20 bargaining session at which Soto and Duarte spoke up with their concerns about the slow pace of negotiations, followed by the circulation of the petition regarding negotiations by both Hernandez and Duarte on June 27. Miller immediately made all of the Respondent's higher level managers aware of the petition circulation. In the 2 months thereafter, the Respondent stepped up its monitoring of its employees' activities and committed multiple violations of Section 8(a)(1), including photographing the petition on June 27; repeatedly stating overly broad prohibitions on union solicitations and discussions to employees in June, July and August; and unlawfully interrogating employees about their union activities twice in July. These numerous unfair labor practices are more than sufficient to establish animus.[27]

It is against this backdrop that I must evaluate each of the alleged violations as to the discipline of Duarte, Hernandez, and Soto, as well as the suspensions and discharges of Hernandez and Soto.

[27] Contreras' statement in April 2014 that the union supporters were "whiners," as well as the Respondent's unlawful unilateral changes and direct dealing with respect to the handbook revisions in April 2014, likewise supports an inference of animus.

B. The July 22 Discipline of Martin Duarte

The Respondent's July 22 warning to Duarte was issued as a result of his conversation with Javier Hernandez on July 18. As described above, I have found that the two employees were discussing the union while they both continued to work, which constitutes protected conduct. Almada observed this conduct and then unlawfully told Duarte he could not speak about union matters during work hours. The warning obviously was motivated by Duarte's union activity. Thus, the General Counsel met the required initial *Wright Line* burden.

The Respondent contends its discipline was based upon Duarte being away from his work station and looking at employee schedules while conversing with Javier Hernandez. No record testimony supports this contention and I find instead that the Respondent disciplined Duarte for the earlier 10–15 minute discussion between the two. In any event, as described above, I have concluded that the portion of their conversation by the work schedules that day lasted under a minute. Therefore, even if that was the basis of the discipline, the discussion did not occupy enough time to be treated as a work interruption. *Wal-Mart Stores*, 340 NLRB 637, 639 (2003). For all these reasons, I conclude the Respondent's justification is a pretext, it could not carry its *Wright Line* burden, and this discipline violated Section 8(a)(3).

C. The Discipline, Suspensions, and Discharge of Francisco Hernandez

The complaint alleges that the Respondent violated the Act by counseling Hernandez on August 2 concerning the posting of the union flyer; issuing him written discipline on August 7; suspending him on August 9; issuing him written discipline on August 11; suspending him again on August 16; and discharging him on August 18.[28]

1. The August 2 counseling for posting a union flyer

With respect to the union flyer posting, there is no statutory right of employees to use an employer's bulletin board. *St. Josephs Hosp.*, 337 NLRB 94, 94–95 (2001). However, where an employer permits its employees to utilize its bulletin board for the posting of notices that are nonwork related, it may not validly discriminate against notices of union meetings which employees post on the same board.

[28] In complaint paragraphs 17(b) and (d), the General Counsel alleges that the Respondent unlawfully issued written discipline to Hernandez on both August 7 and August 11. However, the record does not contain any written discipline for August 7. As to that date, the only testimony from Hernandez was that he met with Hazard and Contreras and Hazard told him he had checked off spring mix as having been delivered when in fact it had not been received. He also testified that Hazard gave him a summary of disciplinary actions form which she said was a final written warning and told him to review the handbook. (Tr. 193, 203.) Based upon the date of Hernandez' final written warning, it appears what Hernandez was describing actually occurred on August 11. (GC Exh. 14.) In addition, the email notifying the Respondent of the missing spring mix was not sent until August 8, so the Respondent could not have disciplined Hernandez on August 7 prior to when it knew the salad had not been delivered. Thus, it appears that Hernandez simply got the date wrong when testifying. Accordingly, I conclude that complaint paragraphs 17(b) and 17(d) are duplicative and recommend the dismissal of paragraph 17(b).

Here, the Respondent's handbook policy on solicitation required any employee posting of materials to be approved by the human resources department. Hernandez admittedly posted the union flyer on a board reserved by Stone Brewing management to communicate with employees, and did not obtain such approval prior to posting. No record evidence was introduced to demonstrate that the Respondent approved or permitted other, nonwork related postings on the Respondent's bulletin board. Absent this showing, it is irrelevant whether the posting in question was covering the Respondent's communication with its employees. Hernandez's posting on a management board was not protected. Accordingly, I conclude Hernandez's August 2 counseling concerning the posting of the union flyer did not violate the Act.

2. The August 9 suspension of and August 11 final written warning issued to Hernandez

Prior to being suspended on August 9, Hernandez engaged in a protected discussion with fellow employees Hancher and Brown about how the Union worked, while the employees either were on break or continued working. After learning about Hernandez's discussion, Pelaez then, as detailed above, unlawfully told Hernandez that he could not talk about the Union during "working hours" because it was an "outside business." This evidence more than adequately sustains the General Counsel's initial *Wright Line* burden.

As with the July 22 discipline of Duarte, the Respondent defends its suspension of Hernandez on the basis of Hernandez disrupting Hancher's work. I again find that asserted reason a pretext. In the enlightening email back and forth between the Respondent's management team after learning of Hernandez's conduct, the issue identified was not the disruption of work. Rather, the supervisors were focused on the fact that Hernandez was talking about the union while Hancher was "on the clock," in violation of the Respondent's Conducting Personal Business policy. The Respondent did not prohibit employees from discussing other nonwork subjects while "on the clock," and thus discriminatorily applied this rule to Hernandez's union activity.

In any event, the Respondent knew that Hernandez had not disrupted Hancher's work. Miller, the Respondent's own manager, testified that Hancher told him he was "cleaning the dining room tables" while he spoke with Hernandez, directly contradicting the Respondent's claim. (Tr. 1269.)

Thus, I reject the Respondent's contention that this warning resulted from Hernandez disrupting Hancher's work. I conclude the Respondent did not sustain its *Wright Line* burden and the August 9 suspension violated Section 8(a)(3).[29]

[29] The General Counsel's complaint alleged that Pelaez also independently violated Section 8(a)(1) during the August 9 meeting by telling Hernandez he "was being suspended for talking about the union during working time." (Complaint paragraph 15(b).) The General Counsel's brief does not address this allegation. Hernandez testified that Pelaez told him, without further elaboration, that he was suspended for a day because the issue had been brought up to him before. I find that testimony insufficient to sustain a violation. In any event, the allegation is duplicative, in light of my finding that Pelaez violated Section 8(a)(1) by saying to Hernandez he could not discuss the Union during work hours in the same meeting. Thus, I recommend dismissal of complaint paragraph 15(b).

I likewise find that the Respondent's August 11 final written warning to Hernandez violated the Act. This warning obviously was precipitated by Hernandez's August 9 conduct, because it was issued to him immediately upon his return to work after his 1-day suspension on August 10 and includes a specific reference to that conduct. Thus, Hernandez's union activity was a motivating factor in the issuance of this warning and the General Counsel's initial *Wright Line* burden is established. I also conclude that the Respondent did not demonstrate it would have issued the warning absent Hernandez's union activity. In its brief, the Respondent did not offer any argument as to why this particular warning was lawful. The only additional, intervening event besides the August 9 union discussion was Hernandez marking the spring mix as received on August 7 when it had not been delivered. As discussed in more detail below, the Respondent's documentary evidence is insufficient to demonstrate that Hernandez's first error in marking an invoice, after he understood the proper procedure, would have resulted in a final written warning, absent his union activity.

3. The August 16 suspension and August 18 discharge of Hernandez

At the time, then, of the Respondent's suspension and discharge of Hernandez, it already had committed numerous unfair labor practices demonstrating both its general animus towards employees' union activities, as well as its specific animus to Hernandez's protected conduct. The unlawful suspension and warning the Respondent issued to Hernandez occurred just a week prior to his termination. This evidence, standing alone, is sufficient to meet the General Counsel's initial *Wright Line* burden as to Hernandez's discharge.[30]

The Respondent contends that Hernandez was discharged solely for his repeated failure to properly perform his invoice checking job duty. As set forth in the termination letter, the Respondent relied upon the August 1 and 2 counseling sessions on the procedure, followed by the August 11 discipline related to the spring mix, and the August 15 marking of sausage when it had not been delivered. The Respondent cited its insubordination and falsification of company records policies as having been violated.

To meet its shifting *Wright Line* burden, then, the Respondent was required to show that it had a general consistent practice of discharging employees for this or similar violations of its procedures. Of course, because the invoice checking policy was new, the Respondent could not, and would not be expected to, establish that it had such a practice specific to that procedure. But the Respondent offered into evidence only one record of another employee being disciplined for failing to perform an expected duty. That employee, utility worker Anthony Moreno, merely was given a first written warning for failing to empty waste containers. (R. Exh. 30, p. 23.) As to insubordination, the Respondent inexplicably introduced records for four employees disciplined for insubordination establishing that none of them had been discharged, including workers with multiple violations of the policy. The Respondent did not introduce any other discipline for violations of the falsification of company records policy, one of its asserted reasons for discharging Hernandez. Finally, the Respondent entered one additional disciplinary record to utility worker Romero, issued after Hernandez's discharge, for failing to follow the invoice checking procedure. The form indicated that Romero, like Hernandez, had been coached twice

[30] As discussed below, the evidence of pretext likewise supports a finding that the General Counsel met the initial burden.

on the policy, but was given only a verbal warning for his first violation of the policy. In contrast, Hernandez was discharged after only his second violation, once he properly understood the procedure. Without question, the Respondent's evidentiary showing in this regard is insufficient to meet its burden.

In contrast, the disciplinary records entered by the General Counsel support the conclusion that the Respondent's discharge of Hernandez constituted disparate treatment and its asserted reason for Hernandez's discharge is a pretext. (GC Exhs. 10 and 11.) The Respondent repeatedly emphasized that Hernandez's invoice checking was needed to prevent the company from paying for items it did not receive. This contention was made despite the Respondent not having lost any money with respect to the spring mix and sausage, because those items ultimately were delivered. Even if it had, though, the missing products totaled $85 in value. The Respondent did not discharge other employees who, due to cash handling errors, actually caused it to lose a similar amount of money. Kimberly Kane committed three cash handling errors totaling $111.78 in less than a month; Dexter Monta committed three errors totaling $93.78 over 4 months; and Hussim Santamaria had two errors totaling $89.78 in 1 month. None of these employees were discharged. The records also establish that the Respondent tolerated more than two cash handling errors without terminating employees.

The Respondent also did not adequately investigate the missing sausage prior to discharging Hernandez. As a preliminary matter, the Respondent's own witnesses provided inconsistent testimony regarding exactly what was missing from this delivery. Zavada testified that four items were missing from the delivery and that he confirmed this, yet the Respondent only referenced the missing sausage when discharging Hernandez. At his termination meeting, Hazard refused to provide any details, other than that the violation involved missing sausage. She did not show Hernandez the invoice in question. She did not give Hernandez any opportunity to address the allegation and refused to answer a question he asked. This likewise supports a finding of pretext.

Finally, the shifting explanations for disciplining Hernandez are informative. When issuing Hernandez his final disciplinary warning on August 11, the Respondent essentially threw the kitchen sink at him, listing almost every prior disciplinary action, save for attendance, it had given Hernandez. It included one unlawful discipline for his union activity and reference to another coaching related to his union posting. However, only 1 week later when discharging him, the Respondent eliminated any reference to Hernandez's union activity and instead relied solely on the invoice checking procedure. I conclude that the removal of the references to Hernandez's union activity, just a week later, is a shifting explanation further indicating that the Respondent's asserted reason for his discharge is a pretext.

At the end of the day, the Respondent's claim, as set forth in its brief, is that it had a legitimate reason for discharging Hernandez. Even if it did, that showing is insufficient to establish that it would have terminated Hernandez absent his union activity. For all these reasons, I conclude the Respondent's asserted reason for discharging Hernandez is a pretext. As such, the Respondent cannot sustain its *Wright Line* burden. The August 16 suspension and August 18 discharge of Hernandez violated Section 8(a)(3).

D. The Suspension and Discharge of Mirna Soto

The General Counsel's complaint alleges that the Respondent violated Section 8(a)(3) by suspending Soto on August 25 and discharging her on August 28. In evaluating these actions, I am mindful that unlawful discrimination against one prounion employee based on antiunion animus often supports an inference that the same animus motivated its actions against other pro-union employees. *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003). Here, the Respondent unlawfully discharged Hernandez just 1 week prior to Soto's suspension.

I conclude that the General Counsel demonstrated that Soto's union activity was a motivating factor for her suspension. The Respondent had not suspended Soto as of August 25, despite having knowledge of the August 20 events, and Schaal's and Paola Hernandez's statements, as of August 22. As Hazard's testimony made clear, the straw that broke the camel's back, and caused the suspension, was Soto's protected activity with O'Rourke on August 25. Soto discussed with O'Rourke their rights and an upcoming union demonstration.[31] This conversation took place while both employees were working. Immediately after O'Rourke told Contreras what they had been discussing, Contreras reported what happened to Hazard and the Respondent suspended Soto. In addition, while it understandably sought out statements from Schaal and Paola Hernandez concerning what occurred on August 20, the Respondent offered no explanation for why those statements contained references to the employees' complaints about Soto's union activity. The inclusion of those complaints further supports the finding that Soto's suspension was motivated by her protected conduct.

For similar reasons, I reach the same conclusion as to the initial *Wright Line* burden concerning Soto's discharge only 2 days later. The only intervening event in the 3 days between Soto's suspension and discharge was the communication that Soto and Gutierrez had with O'Rourke on August 27. That communication likewise constituted protected activity. Soto and Gutierrez initially approached O'Rourke to discuss Soto's suspension and any information O'Rourke had concerning it. The subsequent text messaging between Gutierrez and O'Rourke went to broader issues concerning union representation. Westlye testified that this was one of the incidents relied upon to discharge Soto. Thus, the General Counsel easily has shown that Soto's discharge was motivated, at least in part, by her protected activity.

In making these findings, I reject the Respondent's contention that Soto's conduct on August 27 constituted harassment or retaliation, instead of protected union activity. The Respondent's supervisors, Westlye in particular, appeared to presume that a union activist like Soto or Hernandez who spoke to a coworker with no interest in the Union was per se creating a "hostile work environment." (Tr. 1133, 1152.) However, the Board's long established view is that an employer may not lawfully discipline an employee, or label the employee's conduct as harassment, for making prounion statements that merely cause another employee to feel uncomfortable. *Consolidated Diesel Co.*, 332 NLRB 1019, 1020 (2000). As to O'Rourke, the evidence does not establish any misconduct by Soto on August 27 sufficient to remove her from

[31] The Respondent did not contend contemporaneously, or in its brief, that Soto's act of showing O'Rourke the union flyer on August 25 violated its rule prohibiting the distribution of literature during work times or in work areas. The Respondent's issue with Soto's conduct on that date was the content of the discussion—union matters—and O'Rourke's reaction to Soto's discussion of those matters.

the Act's protection. Even if the Soto and Gutierrez ran after him at the airport in an effort to speak with him, which I find unlikely, that conduct simply does not rise anywhere close to the level of egregious, offensive, or extreme behavior rendering the activity unprotected.[32]

Several other factors support the conclusion that the General Counsel met the initial *Wright Line* burden. These include the timing of Soto's discharge, immediately after her union activity with O'Rourke on August 25 and August 27; the presence of numerous unfair labor practices, including Hernandez's unlawful discharge just 10 days earlier; and the pretext of the Respondent's asserted reason for terminating Soto, based upon shifting explanations and an inadequate investigation.

Regarding shifting explanations, Westlye's written termination form for Soto stated the justification as "creating a hostile work environment based upon incidents on two separate days." At the hearing, Westlye stated the incidents referred to in the termination letter were the ones with Schaal, Paola Hernandez, and O'Rourke.[33] However, both Westlye and Hazard added new reasons beyond harassment for Soto's discharge in their testimony at the hearing. The two testified that Soto also was terminated due to her violation of the English-only policy and for using profanity in the workplace. (Tr. 1121–1122, 1176.) Westlye also threw in that Soto violated the law by being in the airport while on suspension on August 27. The Respondent relied upon these additional reasons in its brief when arguing Soto's discharge was for a legitimate business reason. In addition, Pelaez provided inconsistent testimony concerning what led to Soto's suspension and discharge, alternating between saying it was due to harassment and adding additional reasons to justify the adverse actions. (Tr. 913, 986–991, 1001, 1044, 1046.) The Respondent also elicited testimony and entered documentary evidence in an attempt to suggest that Soto had bullied coworkers as far back as April 2014 and suggested that played into the decision as well. These shifting explanations are indicative of pretext.

As to failure to investigate, the Respondent admittedly provided Soto with absolutely no information about the harassment complaints against her, either when it suspended her or when it discharged her. Although it sought out statements from Schaal, Paola Hernandez, and O'Rourke, the Respondent never asked Soto for her version of what occurred on August 20, 25, and 27 and did not request a statement from her until after the decision to discharge her had been made. Furthermore, Pelaez's assertion that the Respondent's investigation following Soto's suspension consisted of waiting around, for only 3 days, to see if other employees would come forward with information is not indicative of a proper investigation.

I also find that the Respondent did not prove that it would have suspended and discharged Soto absent her protected conduct. Of course, evidence of pretext prevents an employer from sustaining its shifting burden. Beyond that, though, the Respondent did not demonstrate that

[32] The same conclusion applies to the extent that Soto's suspension was due to the complaints of Schaal and Paola Hernandez about Soto's union activities. In both their statements and hearing testimony, the two indicated that the source of their discomfort in this regard was nothing more than Soto's staunch and repeated advocacy for the Union.

[33] Westlye struggled to identify whether the O'Rourke incident was the one on August 25 or the one on August 27, but ultimately appeared to confirm that the second day was August 27 when Soto tried to "confront" O'Rourke. (Tr. 1131–1132.) In any event, I find it likely the Respondent relied upon the events on all three dates when discharging Soto.

Soto's conduct on August 20, standing alone, would have resulted in her suspension and discharge. The Respondent introduced other disciplinary records for harassment. However, the records provide little detail about the conduct of the employees and the Respondent elicited no testimony in that regard. Thus, a meaningful comparison to Soto's conduct is not possible. On their face, though, the Respondent's disciplinary records present a mixed bag of disciplinary actions for prior instances of harassment. Of six total employees, only two were terminated, one was given a 1-day suspension, and three were given final corrective actions. The employee given a 1-day suspension was involved in a physical altercation, conduct more severe than Soto's. One of the employees given only a final corrective action was accused of directing profanity to a coworker, like Soto. The Respondent attempts to overcome this inconsistency by parsing out Soto's two conversations with Schaal and Paola Hernandez on August 20 into four separate disciplinary actions and contending it showed her conduct was serious enough to warrant termination. I reject that argument as the disciplinary records simply do not establish that the Respondent has done this in the past. Accordingly, this evidence is insufficient to carry the Respondent's *Wright Line* burden.

For all these reasons, I conclude that the Respondent unlawfully suspended and discharged Soto in violation of Section 8(a)(3).

IV. THE SECTION 8(A)(5) ALAN RITCHEY ALLEGATIONS[34]

The complaint alleges that the suspensions and discharge of Hernandez, the suspension and discharge of Soto, and the September 22 suspension of Duarte violate Section 8(a)(5) of the Act. These allegations are premised on the Board's decision in *Alan Ritchey*, 359 NLRB No. 40 (2012). In that decision, the Board concluded that an employer whose employees are represented by a union, but in a period of time where the parties have not agreed to a first contract or to an interim grievance procedure, must bargain with the union before imposing discretionary discipline on a unit employee. However, the *Alan Ritchey* decision was invalidated and has no precedential value, as a result of the U.S. Supreme Court's decision in *NLRB v. Noel Canning*, ____ U.S. ___, 134 S.Ct. 2550 (2014). The court there concluded the Board which rendered that decision lacked a quorum, because the President's recess appointments for three positions to the five-member Board were invalid. Nonetheless, the General Counsel and the Union urge me to adopt the Board's *Alan Ritchey* rationale in rendering a decision here. In contrast, the Respondent argues that the current controlling precedent on this issue is the Board's decision in *Fresno Bee*, 337 NLRB 1161 (2002), in which the Board adopted an Administrative Law Judge's decision that no such bargaining obligation exists.

Were *Alan Ritchey* valid precedent, I would find merit to all of the General Counsel's allegations. The Respondent maintains a progressive disciplinary policy which contains five steps, but also states that "varying levels of disciplinary action, suspension, and/or immediate termination may be appropriate based on its facts." The documentary evidence confirms that the Respondent does not always progress through each of the five steps when disciplining employees, including with respect to the suspension and discharge of Soto. It also, at times, has issued more than five disciplinary actions to employees without terminating them. As to

[34] This section addresses the complaint allegations in paragraphs 16(b), 16(d), 16(e), 17(c), 17(e), 17(f), 17(h), 17(i), 18(a), 18(b), 18(d), and 18(e).

Duarte's discipline for attendance, Dillenback testified that the types of discipline given for attendance and tardiness can vary in the event an employee shows improvement over time. Thus, the Respondent exercises discretion when issuing discipline and it did so with respect to each of the alleged disciplinary actions in this case. Moreover, on the dates the actions issued, the Respondent and the Union had not agreed to a first contract or an interim grievance procedure. Finally, no dispute exists that the Respondent did not notify and offer to bargain with the Union over the actions prior to issuing them.[35]

I certainly find the Board's *Alan Ritchey* decision and rationale compelling. If the legal question presented here was an issue of first impression, I would adopt that rationale without hesitation. However, a judge's duty is to apply established Board precedent which the U.S. Supreme Court has not reversed. It is for the Board, not me, to determine whether Board precedent should be altered. *Austin Fire Equipment, LLC*, 360 NLRB No. 131, slip op. at 2 fn. 6 (2014). In *Alan Ritchey*, the Board detailed its disagreement with and specifically overturned *Fresno Bee*. With *Alan Ritchey* invalidated, *Fresno Bee*, even if incorrectly decided, has been reinstated as valid precedent and employers do not have an obligation to bargain in situations like the one presented here. In addition, the Board also applied its *Alan Ritchey* decision prospectively, noting the unexpected burdens that would be imposed on employers if it did not do so. In my view, this same concern applies towards employers now. As a practical matter, employers, like the Respondent here, should not be expected to bargain with a union in these circumstances, at a time when no valid Board decision imposes such an obligation upon them.

Accordingly, I recommend the dismissal of the *Alan Ritchey* complaint allegations.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by engaging in surveillance of employees' union activity when it photographed a petition signed by employees; promulgating and maintaining overly broad prohibitions on solicitations; prohibiting employees from discussing their union membership, activities, and sympathies while permitting employees to discuss other, non-work subjects; and interrogating employees about their union activities.

4. The Respondent violated Section 8(a)(3) and (1) of the Act by disciplining Martin Duarte due to his union and/or protected concerted activities on July 22.

[35] With respect to Soto, I reject the Respondent's contention that, even if it had a bargaining obligation under *Alan Ritchey*, its suspension and termination of Soto was permitted as an exigent circumstance because she made a threat to Pelaez's safety and the Respondent needed to secure the workplace. As discussed above, I find that Soto's comment about Pelaez cannot be taken literally or construed as a credible threat.

5. The Respondent violated Section 8(a)(3) and (1) of the Act by suspending Francisco Hernandez on August 9; issuing him a final written warning on August 11; suspending him on August 16; and discharging him on August 18, all due to his union and/or protected concerted activities.

6. The Respondent violated Section 8(a)(3) and (1) of the Act by suspending Mirna Soto on August 25 and discharging her on August 28, due to her union and/or protected concerted activities.

7. The Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing a revised employee handbook in April 2014 containing changes to employees' terms and conditions of employment without prior notice to the Union and without affording the Union an opportunity to bargain.

8. The Respondent violated Section 8(a)(5) and (1) of the Act by bypassing the Union and dealing directly with employees in the bargaining unit when it required employees to sign a form acknowledging receipt of the April 2014 revised employee handbook and reserving to the Respondent the right to unilaterally change employees' terms and conditions of employment in the future.

9. The above unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

10. The Respondent did not violate Section 8(a)(1) by interrogating employees about their union membership, activities, and sympathies in mid-August 2014 as alleged in complaint paragraph 14(a).

11. The Respondent did not violate Section 8(a)(1) by telling an employee that the employee was being suspended for talking about the union during work time as alleged in complaint paragraph 15(b).

12. The Respondent did not violate Section 8(a)(3) and (1) by counseling Francisco Hernandez on August 2 or by issuing written discipline to Hernandez on August 7.

13. The Respondent did not violate Section 8(a)(5) and (1) of the Act by suspending and discharging Hernandez; suspending and discharging Soto; and suspending Duarte without prior notice to and without affording the Union an opportunity to bargain.

REMEDY

Having found that the Respondent engaged in certain unfair labor practices, I find that it must be ordered to cease and desist from such conduct and to take certain affirmative action designed to effectuate the policies of the Act. Having found that the Respondent unlawfully suspended and discharged Francisco Hernandez and Mirna Soto, I shall order it to offer the two employees full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or

privileges previously enjoyed, and to make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

Backpay shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). In addition, the Respondent must compensate Francisco Hernandez and Mirna Soto for the adverse tax consequences, if any, of receiving a lump-sum backpay award and to file a report with the Social Security Administration allocating the backpay award to appropriate calendar quarters. *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014).

I also shall order the Respondent to remove from its files the unlawful discipline issued to Martin Duarte and Francisco Hernandez, as well as any references to the unlawful suspensions and discharges of Francisco Hernandez and Mirna Soto, and to notify the employees in writing that this has been done and that the unlawful discipline, suspensions, and discharges will not be used against them in any way.

Having found that the Respondent unlawfully promulgated and maintained overly broad prohibitions on solicitations and union discussions, I shall order it to notify its unit employees in San Diego, California, in writing that: 1) it will not prohibit employees from soliciting other employees, including by seeking and obtaining signatures on a union petition, during nonworking time in nonworking areas and during nonworking time in working areas in the back of the house locations of the Respondent's restaurants;[36] and 2) it will not prohibit employees from discussing their union activities, sympathies, or support during working time where they continue working while having the discussion.

Finally, having found that the Respondent unilaterally implemented an employee handbook revision with changes to employees' terms and conditions of employment, I shall order it, upon request of the Union, to rescind the changes to its attendance and tardiness policies. I also shall order the Respondent to rescind the forms signed by employees upon receiving that revised handbook, in which the employees acknowledged that the Respondent could unilaterally change their terms and conditions of employment.

The General Counsel's complaint requested an additional, special remedy requiring the Respondent to read the notice to its employees. However, the General Counsel offered no argument in its brief as to why such a remedy is warranted. As a result, and without any evidence of the Respondent having committed prior unfair labor practices, I conclude the Board's traditional remedies are adequate to address the Respondent's unlawful conduct and deny the General Counsel's request.

[36] Solicitation in working areas is properly restricted to back-of-the-house locations where no customers are present, pursuant to the Board's retail establishment/restaurant exception.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[37]

ORDER

The Respondent, High Flying Foods, San Diego, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Disciplining, suspending, or discharging any employee due to their union or protected concerted activities.

(b) Engaging in unlawful surveillance of employees' union activities.

(c) Coercively interrogating employees concerning their union activities.

(d) Promulgating and maintaining rules prohibiting employees from soliciting other employees, including by seeking and obtaining signatures on a union petition, during nonworking time in nonworking areas and during nonworking time in working areas in the back-of-the-house.

(e) Prohibiting employees from discussion of their union activities, sympathies, or support, while permitting employees to talk about other, nonwork subjects, during working time.

(f) Implementing a revised employee handbook containing changes in employees' terms and conditions of employment without prior notice to the Union and without affording the Union an opportunity to bargain.

(g) Bypassing the Union and dealing directly with unit employees by requiring employees to sign a form in which they agree that the Respondent may unilaterally change their terms and conditions of employment.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Francisco Hernandez and Mirna Soto full reinstatement to their former jobs or, if those jobs no longer

[37] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Francisco Hernandez and Mirna Soto whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.

(c) Compensate Francisco Hernandez and Mirna Soto for the adverse tax consequences, if any, of receiving a lump sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

(d) Within 14 days from the date of this Order, remove from its files any references to the unlawful discipline of Martin Duarte, the unlawful discipline, suspensions, and discharge of Francisco Hernandez, and the unlawful suspension and discharge of Mirna Soto, and notify these employees in writing that this had been done and that none of these adverse actions will be used against them in any way.

(e) Within 14 days from the date of this Order, notify its San Diego, California unit employees in writing that it will not prohibit employees from soliciting other employees, including by seeking and obtaining signatures on a union petition, during nonworking time in nonworking areas and during nonworking time in working areas in the back-of-the-house locations of the Respondent's restaurants.

(f) Within 14 days from the date of this Order, notify its San Diego, California unit employees in writing that it will not prohibit employees from discussion of their union activities, sympathies, or support during working time.

(g) Rescind the forms signed by employees acknowledging that the Respondent could unilaterally change their terms and conditions of employment.

(h) Upon request of the Union, rescind the revisions to the attendance and tardiness policies contained in the 2014 employee handbook.

(i) Preserve, and within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the backpay due under the terms of this Order;

(j) Within 14 days after service by the Region, post at its facility in San Diego, California, copies of the attached notice marked "Appendix."[38] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 days in conspicuous places including all places were notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former unit employees employed by the Respondent at any time since February 14, 2014.

(k) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Regional Director attesting to the steps the Respondent has taken to comply.

Dated, Washington, D.C., May 19, 2015.

_____
Charles J. Muhl
Administrative Law Judge

[38] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT discipline, suspend, or discharge you due to your union or protected concerted activities, including your support for UNITE HERE! Local 30 (the Union).

WE WILL NOT engage in surveillance of employees' union activities.

WE WILL NOT coercively interrogate employees concerning their union activities.

WE WILL NOT create and maintain rules prohibiting employees from soliciting other employees, including by seeking and obtaining signatures on a union petition, during nonworking times in nonworking areas and during nonworking times in working areas in the back of the house.

WE WILL NOT prohibit employees from discussing their union activities, sympathies, or support during working time.

WE WILL NOT change employees' terms and conditions of employment, including through revisions to our employee handbook, without first providing the Union notice and an opportunity to bargain over such changes.

WE WILL NOT bypass the Union and deal directly with you, by requiring you to sign a form acknowledging that we may unilaterally change your terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of this order, offer Francisco Hernandez and Mirna Soto full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Francisco Hernandez and Mirna Soto whole for any loss of earnings or other benefits suffered as a result of the discrimination against them, with interest.

WE WILL compensate Francisco Hernandez and Mirna Soto for the adverse tax consequences, if any, of receiving a lump sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

WE WILL, within 14 days from the date of this order, remove from our files all unlawful discipline issued to Martin Duarte and Francisco Hernandez, as well as all references to the unlawful suspensions and discharges of Francisco Hernandez and Mirna Soto; and, within 3 days thereafter, we will notify the employees that this has been done and the discipline, suspensions, and discharges will not be used against them in any way.

WE WILL, within 14 days from the date of this order, notify our unionized employees in San Diego, California in writing that we will not prohibit them from 1) soliciting other employees, including by seeking and obtaining signatures on a union petition, during nonworking time in nonworking areas and during nonworking time in working areas in the back of the house; and 2) discussing their union activities, sympathies, or support during working time.

WE WILL, upon request of the Union, rescind our revisions to the attendance and tardiness policies contained in the 2014 employee handbook.

WE WILL rescind the forms signed by employees upon receiving the revised 2014 employee handbook, which unlawfully stated that we could unilaterally change your terms and conditions of employment.

HIGH FLYING FOODS

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

888 South Figueroa Street, 9th Floor, Los Angeles, CA 90017-5449

(213) 894-5200, Hours: 8:30 a.m. to 5 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/21-CA-135596 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (303) 844-6647.